90-1362

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-___

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MAURICE WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE N. CAMERON *
MILTON L. CHAPPELL
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioner
* *Counsel of Record*

February 28, 1991

QUESTIONS PRESENTED

1. Is an interpretation of Section 19 of the National Labor Relations Act, 29 U.S.C. § 169, which avoids a conflict with the Religion Clauses of the First Amendment possible, or is the lower court correct in judicially eliminating this portion of the nation's basic labor policy?

2. If the court below correctly determined that a statutory construction of Section 19 which avoids a conflict with the Religion Clauses is not possible, did it err by declaring the statute a nullity, thus denying the benefits of the statute to those Congress intended to benefit?

PARTIES TO THE PROCEEDINGS BELOW

Maurice Wilson and the National Labor Relations Board were the only parties to the proceedings below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. This Case Is Important Because, for the First Time Since the Passage of the National Labor Relations Act in 1935, a Portion of the Nation's Basic Labor Policy Has Been Eliminated by the Judiciary 6

II. This May Be the Only Opportunity to Resolve This Issue 7

III. When the Court Below Vetoed a Basic Portion of Congressional Labor Policy, Its Ruling Came in Conflict With the Precedents Set by This Court 8

TABLE OF CONTENTS - CONTINUED

Page

IV. If the Court Below Had Examined the Legislative History of Section 19, It Would Have Found That a Constitutional Construction of Section 19 is Both Possible and Reasonable 10

V. Congress Has Specifically Instructed the Judiciary That When It Finds a Constitutional Defect in the NLRA, It Should Retain as Much as Possible of What Congress Has Written 16

VI. Even if This Court Should Agree With the Court Below That a Constitutional Construction of Section 19 Is Impossible, the Remedy Adopted Below Is in Conflict With Both the Precedents of This Court and Congressional Intent 18

CONCLUSION 21

APPENDICES

A. Opinion of the United States Court of Appeals for the Sixth Circuit, dated December 4, 1990 ..... 1a

B. Decision and Order of the National Labor Relations Board (which incorporates the July 18, 1988 decision of the Administrative Law Judge), dated March 31, 1989 ..... 13a

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 9, 20

Braden v. Herman, 468 F.2d 592 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973) 7

Califano v. Goldfarb, 430 U.S. 199 (1977) 20

Califano v. Westcott, 443 U.S. 76 (1979) 17, 19

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) 19

Communications Workers v. Beck, 487 U.S. 735 (1988) 8, 10, 11, 16

E&L Transport Co., No. 7-CA-28939 (1989) 7

E&L Transport Co., 17 AMR ¶ 27026 (1989) 7

Ellis v. Railway Clerks, 466 U.S. 435 (1984) 8

Employment Division v. Smith, ___ U.S. ___, 110 S. Ct. 1595 (1990) 6, 18

Grant v. Spellman, 99 Wash. 2d 815, 664 P.2d 1227 (1983) 10

Heckler v. Mathews, 465 U.S. 728 (1984) 20

IAM v. Street, 367 U.S. 740 (1961) 8, 9, 11, 16

TABLE OF AUTHORITIES - CONTINUED

Page

Jimenez v. Weinberger, 417 U.S. 628 (1974) 19

Lemon v. Kurtzman, 403 U.S. 602 (1971) 5

Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) 9

NLRB v. Catholic Bishop, 440 U.S. 490 (1979) 10

Reed v. Collyer, 487 U.S. 1225 (1988) 7

School Committee v. Greenfield Education Association, 385 Mass. 70, 431 N.E.2d 180 (1982) 9

Sherbert v. Verner, 374 U.S. 398 (1963) 18

Sherr v. Northport-East Northport Union Free School District, 672 F. Supp. 81 (E.D.N.Y. 1987) 10

United States v. Rumely, 345 U.S. 41 (1953) 10

Welsh v. United States, 398 U.S. 333 (1970) ..... *passim*

Young v. Southwestern Savings & Loan, 509 F.2d 140 (5th Cir. 1975) 14

TABLE OF AUTHORITIES - CONTINUED

Page

Constitutional and Statutory Provisions

U.S. Const. amend. I ..... *passim*

26 U.S.C. § 501(c)(3) 3

28 U.S.C. § 1254(1) 2

National Labor Relations Act

§ 8, 29 U.S.C. § 158 ..... 8, 16

§ 8(a)(3), 29 U.S.C. § 158(a)(3) 6

§ 10(f), 29 U.S.C. § 160(f) 5

§ 16, 29 U.S.C. § 166 ..... 3, 16, 17, 19

§ 19, 29 U.S.C. § 169 ..... *passim*

Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.* 11, 13

Railway Labor Act, § 2, Eleventh, 45 U.S.C. § 152, Eleventh 8

Miscellaneous

120 Cong. Rec. (1974)

pp. 12950-55 12

pp. 12955-56 11

TABLE OF AUTHORITIES - CONTINUED

Page

p. 12968 12

pp. 13536-43 12

p. 16914 13

pp. 16915-16 13

p. 22575 13

p. 22577 13

126 Cong. Rec. (1980)

p. 2580 15

pp. 2581-82 ..... 13, 14, 15

p. 2583 15

p. 2584 15

pp. 3579-80 13

1980 U.S. Code Cong. & Admin. News 7158 14

Webster's New Twentieth Century Dictionary (2d ed. 1978) 17

No. 90-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Maurice Wilson respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on December 4, 1990.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") *infra*, at 1a) will be reported at 920 F.2d 1282. The opinion of the National Labor Relations Board ("NLRB") (App. at 13a),

which incorporates the decision of the Administrative Law Judge ("ALJ") (App. at 16a), is issued *sub nom. Local Union 836, Amalgamated Transit Union (Grand Rapids City Coach Lines, Inc.)*, 293 N.L.R.B. No. 62 (1989).

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT I—Freedom of religion, speech and press; peaceful assemblage; petition of grievances

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

29 U.S.C. § 169. Employees with religious convictions; payment of dues and fees

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organiza-

tion charitable fund exempt from taxation under section 501(c)(3) of Title 26, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure. (July 5, 1935, c. 372, § 19, as added July 26, 1974, Pub.L. 93-360, § 3, 88 Stat. 397, and amended Dec. 24, 1980, Pub.L. 96-593, 94 Stat. 3452.)

29 U.S.C. § 166. Separability of provisions

If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. (July 5, 1935, c. 372, § 16, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151.)

STATEMENT OF THE CASE

Maurice Wilson, the petitioner, was an employee of the Grand Rapids City Coach Lines ("employer").[1] The Amalgamated Transit Union, Local 836 ("union") has an agreement with the employer which requires all employees to join or financially support the union as a condition of employment.[2]

---

[1] App. at 17a.

[2] *Id.*

Mr. Wilson was not a member of the union.[3] When asked to join or financially support the union he declined because of his sincere religious convictions that joining or financially supporting the union is contrary to the teachings of the Bible.[4] Mr. Wilson's religious beliefs about unions are based on his own religious study, and are not based on the teachings of an "organized" denomination or church of which he is a member.[5] Since he could not financially support the union, Mr. Wilson offered to pay his dues to a charity. This offer was unacceptable to the union which demanded that the employer discharge Mr. Wilson.[6]

Conscious of liability should it discharge Mr. Wilson, the employer filed an unfair labor practice charge based on Section 19 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 169, against the union for making this discharge demand.[7] Briefly stated, Section 19 allows those religious objectors who are members of certain authorized churches to pay their union fees to a charity instead of the union.

The General Counsel of the NLRB issued a complaint and the case went to hearing before an ALJ. The ALJ dismissed the complaint on the basis that Mr. Wilson was not a member of an authorized church.[8] On that same basis, but declining to rule on

---

[3] *Id.*

[4] Transcript of ALJ trial ("Tr.") at 12-13, 15-18.

[5] ALJ Hearing, Joint exhibit ("Jt. ex.") 5, at 1 (Oct. 28, 1986 "Statement of Christian Convictions," by Maurice S. Wilson).

[6] Tr. at 49-50; Jt. ex. 8.

[7] Tr. at 50.

[8] App. at 18a-19a.

the constitutional questions involved, a three-member panel of the NLRB upheld the dismissal.[9]

The employer took no further legal action, but Mr. Wilson, fearing the loss of his job, filed a petition for review with the court of appeals.

The court of appeals found that a statute which grants religious exemption based upon membership in a specific religious denomination is subject to "strict scrutiny" and must be supported by a "compelling state interest" that is "closely fitted" by the law.[10] The appeals court found that this distinction between religions was not supported by a compelling state interest. It also found that the statute failed the *Lemon*[11] test.[12]

Although the appeals court agreed with Mr. Wilson that he could not be denied an accommodation of his religious beliefs based on his church membership, the court completely invalidated Section 19. This deprived Mr. Wilson of any basis for claiming an accommodation of his religious beliefs under the NLRA, and thus his petition was denied.

The court of appeals had jurisdiction over this appeal pursuant to § 10(f) of the NLRA, 29 U.S.C. § 160(f).

---

[9] *Id.* at 14a & n.1.

[10] *Id.* at 6a.

[11] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[12] App. at 7a-9a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS IMPORTANT BECAUSE, FOR THE FIRST TIME SINCE THE PASSAGE OF THE NATIONAL LABOR RELATIONS ACT IN 1935, A PORTION OF THE NATION'S BASIC LABOR POLICY HAS BEEN ELIMINATED BY THE JUDICIARY.

Section 19 (29 U.S.C. § 169) is the only section of the NLRA which even purports to accommodate the religious beliefs of those employees who cannot, consistent with their conscience, join or financially support a labor union. Through the action of a panel of the Sixth Circuit, this section of the basic labor policy of the country is now, as a practical matter, wiped off the books.

This protection for religious minorities was not eliminated because of a national consensus manifesting itself through an act of Congress. *See Employment Div. v. Smith*, ___ U.S. ___, 110 S. Ct. 1595, 1606 (1990). Instead, this act of Congress was eliminated by a court which opined that it would not "perform a legislative function" or "judicially redraft statutory language." App. at 11a.

Consider the conflict between the court's stated goal of not usurping the legislative function and what it did. Any observer, without taking even a peek at the legislative history of Section 19, would see from the text of the statute that Congress intended to create a safe harbor for religious objectors from the draconian provisions of section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), which permit the discharge of employees who decline to support the union. Can it reasonably be said that the judiciary engages in less "judicial[] redraft[ing]" when it takes its judicial pen and blacks out the entire section protecting religious objectors, than when it does its best to save the section by simply blacking out the (admittedly) offensive church membership requirement which limited that protection?

If this Court allows the decision below to stand, it will be the first time since the passage of the NLRA that this Court has

allowed the judiciary to veto a portion of the nation's basic labor policy.

II. THIS MAY BE THE ONLY OPPORTUNITY TO RESOLVE THIS ISSUE.

An employee claiming that his employer or union has committed an unfair labor practice under the NLRA is not permitted to walk into court with his claim. Instead, he must file a charge with the General Counsel of the NLRB. If the General Counsel does not issue a complaint, the employee has absolutely no recourse to force the General Counsel to issue a complaint. *Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973). *See Reed v. Collyer*, 487 U.S. 1225 (1988) (Scalia, J., dissenting from the denial of a petition for writ of certiorari).

Since the NLRB has taken the position in this case that employees like Mr. Wilson are not covered by Section 19 (App. at 14a), and since the appeals court has struck down Section 19 (App. at 12a), it is unlikely that the General Counsel's office will issue a complaint for any religious objector, and almost certain that it will not issue a complaint for an employee in the same position as Maurice Wilson.[13] Thus, in all likelihood, this is the only opportunity for this Court to address this issue.

---

[13] For example, in *E & L Transport Co.*, No. 7-CA-28939 (1989), the General Counsel's office of the NLRB refused to issue a complaint for a religious objector under Section 19, citing the NLRB's decision in Mr. Wilson's case. The NLRB also issued an advice memorandum regarding the foregoing case in which it said that personally held religious beliefs would not be protected by Section 19. *E & L Transport Co.*, 17 AMR ¶ 27026 (1989).

III. WHEN THE COURT BELOW VETOED A BASIC PORTION OF CONGRESSIONAL LABOR POLICY, ITS RULING CAME IN CONFLICT WITH THE PRECEDENTS SET BY THIS COURT.

Congress has experienced difficulty drafting the union security provisions[14] of the nation's basic labor laws in a way that avoids constitutional problems. Notwithstanding this difficulty, this Court has never taken upon itself to strike down these union security provisions. In decisions ranging from *IAM v. Street*, 367 U.S. 740 (1961) to the decision two terms ago in *Communications Workers v. Beck*, 487 U.S. 735 (1988), this Court has shown an extraordinary reluctance to strike down union security provisions and a ready willingness to find and implement congressional intent without offending the Constitution.

In *Street*, this Court took the language of section 2, Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh, that required full union membership and full union dues payment as a condition of employment, and decided that it really meant employees were required neither to join the union nor to pay a fee equal to union dues. *Street*, 367 U.S. at 768-69.

In *Beck*, this Court took the provisions of section 8 of the NLRA, 29 U.S.C. § 158, which "requir[ed] as a condition of employment membership [in the union]" and spoke of termination for employees who did not "tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership," to mean that the employee did not have to be a union member as a condition of employment and did not even have to pay union dues. Instead, the employee was only required to reimburse the union for what it could prove it spent for collective bargaining expenses. *Beck*, 487 U.S. at 749-54, 762-63.

---

[14] A "union security provision" permits an agreement requiring unwilling employees to either join the union or pay some portion of union fees.

This Court's efforts to save the union security clause of the RLA in *Street* were later termed by Justice Powell, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), to be a "strained construction." *Id.* at 248 (Powell, J., concurring).[13] To the same extent that this Court has been willing to repeatedly "strain" to protect the congressional intent to saddle unwilling employees with union security obligations, the Court below should have "strained" to protect the congressional intent to create a safe harbor from union security obligations for religious minorities.

The judicial approach to the union security provisions of the federal labor laws must be balanced. This Court's heroic efforts to save those statutes which impose union obligations on employees should be applied with equal, or greater, vigor to statutes which exempt employees from union obligations. The very nature of the interests at stake requires this.

The Massachusetts Supreme Judicial Court has rightly pointed out, in *School Committee v. Greenfield Education Association*, 385 Mass. 70, 84, 431 N.E.2d 180, 189 (1982), that the interests supporting the imposition of union security obligations are merely statutory and contractual, but the interests of those seeking exemption from union security obligations are bottomed on constitutional right. *Cf. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529-31 (1949).

---

[13] In a later decision, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), this Court noted that the union security provisions of the RLA would be construed to protect employees from being forced into joining the union or paying a fee which included expenses for activities other than collective bargaining. This construction was followed notwithstanding the fact that the Court specifically noted that the statute contained no explicit limitations of this type, opponents of the legislation objected to it on the basis of this lack of limitations (yet it was passed), and Congress was well aware that the railroad unions used dues for purposes other than collective bargaining. *Id.* at 445-46.

Since the objectors are exercising constitutional rights, if anything, greater effort should be expended to save those provisions which grant exemption from union security obligations. *See United States v. Rumely*, 345 U.S. 41, 47 (1953) (court should "strain" words to avoid constitutional problem).

In addition to this Court's special efforts to preserve union security legislation, this Court has also put forth special effort to ensure that statutes dealing with religion are construed to produce a constitutional result. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (even though statute contained no exception for nonprofit religious schools, the Court read an exception into the statute); *Welsh v. United States*, 398 U.S. 333 (1970) (plurality) (even though statute required "religious belief" in a "Supreme Being" for exemption, and specifically excluded exemption based on "personal moral code," plurality construed statute to allow exemption based on moral belief that was neither religious nor based on a Supreme Being).[16]

IV. IF THE COURT BELOW HAD EXAMINED THE LEGISLATIVE HISTORY OF SECTION 19, IT WOULD HAVE FOUND THAT A CONSTITUTIONAL CONSTRUCTION OF SECTION 19 IS BOTH POSSIBLE AND REASONABLE.

While reading the union membership language out of the statute in *Beck*, this Court spoke of the judicial limits on rewriting statutes to save them from constitutional defect. The conclusion reached by this Court is that statutory [re]construction to save an otherwise unconstitutional statute is permissible if it is not plainly contrary to congressional intent. *Beck*, 487 U.S. at 762.

---

[16] Lower courts dealing with religious exemption provisions which are similar to the one at issue here have broadly read the religious exemption to include all religious objectors. *Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81 (E.D.N.Y. 1987); *Grant v. Spellman*, 99 Wash. 2d 815, 664 P.2d 1227 (1983).

The court below not only failed to try to save Section 19 based on the obvious congressional intent discernible from the face of the statute (*i.e.*, to create a safe harbor for religious objectors), it also was unwilling to look at the legislative history of Section 19. App. at 10a.[17]

An examination of the legislative history of Section 19 would have allowed the lower court to act in accord with, and not in opposition to, congressional intent. This Court, in *Beck* and in *Street*, carefully parsed the legislative history of the union security clauses at issue to find a congressional intent that would allow the Court to save the statute. The court below could have done the same to save Section 19.

The language in Section 19 originated as part of the 1974 amendments to the NLRA which brought nonprofit, nonpublic hospitals within its coverage. Part of the debate over the "hospital amendments" arose over the fact that many of these hospitals were run by religious organizations.[18]

One of those organizations, the Seventh-day Adventist Church, had a peculiar complaint. The Church taught its members to refrain from joining or financially supporting labor unions. How could the Church, as the owner of a large number of hospitals, bargain in good faith with a union over union

---

[17] Justice Harlan, who thought the judicial reconstruction in *Welsh* had gone too far, stated that it is perfectly proper for this Court to give statutory language a meaning not necessarily envisioned by Congress if the purpose is to achieve legislative policy. *Welsh*, 398 U.S. at 346-47 (Harlan, J., concurring.) In light of the congressional intent reflected in the broad protections for all religious objectors enacted in Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e) *et seq.*, and the legislative history of Section 19, the court below frustrated legislative intent by striking down Section 19.

[18] 120 Cong. Rec. 12955-56 (1974) (remarks of Sen. Cranston).

security clauses which would compel this proscribed support of unions?[19]

The problem was particularly acute in the eyes of Adventist Church leadership because the Church's hospitals employed large numbers of its own Church members. How could the Church teach that members should not support unions, yet compel that very support through a collective bargaining agreement?

An amendment was introduced by Senator Sam Ervin which would resolve this conflict and exempt Seventh-day Adventist hospitals, among others, from the coverage of the hospital amendments.[20] This amendment lost. The debate reveals that one of the chief reasons it lost was that the Senate did not want to exempt a large number of employers from the obligation to bargain, and thus exclude a large number of hospital employees from the benefits of collective bargaining.[21]

Still concerned about Seventh-day Adventists, Congress took another tack to avoid the conflict between extending the NLRA over Adventist hospitals, and the teachings of the Church. The House approached it from the point of view of the employee (church member) instead of the employer (Church hospital). An amendment was proposed which would add a new section to the hospital amendments.[22] This amendment, proposed by Representative Erlenborn, exempted from the coverage of union security clauses hospital employees, like Seventh-day Adventists, who were members of churches which taught their members not

---

[19] *Id.* at 12950-55 (remarks of Sen. Ervin, brief of Seventh-day Adventist Church and statement of Melvin Adams).

[20] *Id.*

[21] *Id.* at 12968 (remarks of Sen. Cranston).

[22] Senator Dominick had also introduced in the Senate an amendment which would allow employees to make an alternative charitable payment. This amendment was tabled. *Id.* at 13536-43.

to become union members.[23] This bill passed the House.[24] Later, in a conference committee, the House language adding Section 19 was added to the conference resolution and additional language was added requiring an alternative payment to a charity.[25] Thus, the specific problem raised by the Seventh-day Adventist church was addressed and corrected.

However, in 1980, Section 19 underwent a radical change. While the original amendment was passed to cure the problems that Seventh-day Adventists might face in their own hospitals, the 1980 amendments to Section 19 broadened its coverage from health care employees to all employees covered by the NLRA.[26] The very breadth of the change in the coverage of this statute demonstrated that Congress had moved far beyond the problem of Seventh-day Adventists and their hospitals.

Legislative history for the 1980 amendment is limited, but clear. In the Senate, there was no report or meaningful debate. The members of the House, however, extensively referred to the rights of religious objectors under Title VII (specifically section 701(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j)) and to Title VII cases which held that employees who had religious objections to union membership or the payment of union dues were entitled to pay their fees to a charity.[27] This discussion was in the context of providing employees covered by the NLRA with the same kinds of rights they had under Title VII.

---

[23] *Id.* at 16914.

[24] *Id.* at 16915-16.

[25] *Id.* at 22575 (remarks of Sen. Williams) and 22577 (remarks of Sen. Cranston).

[26] 126 Cong. Rec. 3579-80 (1980) (remarks of Rep. Thompson).

[27] *See, e.g., id.* at 2581-82 (remarks of Rep. Clausen).

Therefore, the declared purpose of the 1980 amendment to Section 19 was:

> to resolve any conflict [between the NLRA and Title VII] and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the Federal courts of appeals ruling on the issue have found to be an accommodation acceptable under title VII.[28]

Of course, Title VII protects religious beliefs of all kinds and has no requirement of church membership. *Young v. Southwestern Savings & Loan*, 509 F.2d 140, 142 (5th Cir. 1975).

An examination of congressional debate shows the discussion focused on three dominant points. First, Congress wanted to bring the union security provisions of the NLRA into line with the religious accommodation provisions of Title VII.[29] Second, Congress wanted to create a more direct mechanism for accommodation of religious belief and place its stamp of approval on

---

[28] *Id.* at 2582.

[29] The House of Representatives Committee report is reprinted in 1980 *U.S. Code Cong. & Admin. News* 7158. That report contains a statement by several members of the committee discussing the impact of the First Amendment:

> Some feel that the religious accommodation represented by this bill does not rise to the status of a First Amendment issue although others recognize it as such. By recognizing that this bill accommodates the religious beliefs of certain small religions and sects, and thereby reconciles the National Labor Relations Act with the Equal Employment Opportunity Act, we feel that the First Amendment constitutional rights are fully protected, for that is what the Equal Employment Opportunity Act sought to accomplish. Certainly, this bill accepts the principle of religious liberty as guaranteed by our Constitution, and implemented by the Equal Employment Opportunity Act, and it is clear that the bill prefers that principle over any conflict with it raised by our national labor policy.

Id. at 7161.

the charity substitution solution reached by the judiciary.[30] Third, Congress thought that religious objectors had a First Amendment right to refrain from compromising their consciences through the support of labor unions.[31]

Section 19's original purpose was to offer a solution for Seventh-day Adventists whose hospitals and employees were being drawn within the coverage of the NLRA. It was a compromise to avoid a conflict with their distinct religious beliefs. The debate on the 1980 amendment shows that Section 19 was pulled loose from its roots. Its purpose now was to demonstrate that Congress approved of the charity substitution accommodation approved by the judiciary in Title VII cases and that Congress wanted to bring the NLRA into line with that case law.

With this legislative history as background, was the action of the court below, in striking down Section 19, "plainly contrary to the intent of Congress?" The answer is a resounding "yes." The court below, by completely ignoring both the history of the

---

[30] Representative Erlenborn stated, "Accommodation can be more rapidly achieved through congressional action than through costly and protracted court litigation." (126 Cong. Rec. 2584 (1980))

[31] Mr. Hinson declared, "This legislation is necessary to reconcile the first amendment of the Constitution with the provisions of the NLRA." (*Id.* at 2580)

Mr. Buchanan made reference to Mr. Hinson's remarks, saying "I would like to join the gentleman in saying we deal here with the constitutional rights of American citizens." (*Id.* at 2581) Mr. Clausen, co-sponsor of the bill, went into considerable detail as to why "laws neutral on their face may, in their application, offend the constitutional requirement of governmental neutrality if free exercise of religion is unduly burdened." (*Id.*)

Mr. Duncan, in commenting on the bill, said "[t]o me, this is a reasonable compromise between the constitutional right to freedom of religion and the statutory right, which has been written into our laws, of union security." (*Id.* at 2583)

Mr. Erlenborn opined that, "[t]his bill accepts the principles of religious liberty as guaranteed by our Constitution and implemented by the Equal Employment Opportunity Act." (*Id.* at 2584)

Others in Congress made similar remarks.

statute and the legislative history of the most recent amendment, did precisely what it said it could not do: act contrary to the intent of Congress. App. at 10a.

If this Court is to take its lead from Congress in dealing with statutory rights, the correct solution here is to interpret the statute to read out the unconstitutional language—the restrictive church membership clause—and retain the religious accommodation language that parallels Title VII rights.

V. CONGRESS HAS SPECIFICALLY INSTRUCTED THE JUDICIARY THAT WHEN IT FINDS A CONSTITUTIONAL DEFECT IN THE NLRA, IT SHOULD RETAIN AS MUCH AS POSSIBLE OF WHAT CONGRESS HAS WRITTEN.

Section 16 of the NLRA, 29 U.S.C. § 166, contains the instruction to the judiciary that if there is a constitutional problem in anything that Congress has written in the statute, the court is to retain as much of the congressional enactment as possible.

This congressional directive compels a search for a constitutional reading of Section 19. Since it is only the church membership language that creates the constitutional problem in Section 19, that language, and that language alone, can and should be read out of the statute. In practical effect, that is precisely what this Court did in both *Street* and *Beck* in reading out the union membership language. (In fact, in *Beck*, this Court did not even reach the issue of whether the Constitution required it to read the union membership provisions out of the statute.) Reading the church membership requirement out of Section 19 is certainly no more onerous than reading the union membership requirement out of Section 8.

The court below refused to use Section 16 to eliminate only the offending portion of Section 19, in part, because:

> Section 16 preserves other provisions of the subchapter when one provision is declared invalid. It does not preserve the remainder of a provision when a portion thereof is invalidated.

App. at 11a.

By this interpretation of Section 16, the court below drew a distinction which is contrary to both the plain meaning of the word "provision" and the decisions of this Court dealing with other savings clauses which use the term "provision."

The court below equated the term "provision" with the formal "sections" of the NLRA. Certainly a section of the NLRA can have more than one provision. Webster's New Twentieth Century Dictionary (2d ed. 1978) defines a provision as: "a clause, as in a legal document, agreement, etc., stipulating or requiring some specific thing; a condition." Here, the provision, the condition, that is invalid is that which requires church membership. Striking out that "provision" and retaining the rest of the "provisions" of Section 19 permit the following reading: "Any employee who [holds] conscientious objections to joining or financially supporting labor organizations shall not be [so required]."

Other federal statutes contain savings clauses which are very similar to Section 16 and which refer to the invalidity of a "provision" of the statute. This Court has relied upon these savings clauses to justify the modification of just a word or phrase in the statute instead of striking down the entire section. *Califano v. Westcott*, 443 U.S. 76, 90 (1979) (savings clause used as partial basis for expanding statutory reference to "his father" to include both mother and father); *Welsh*, 398 U.S. at 364-65 (Harlan, J., concurring in result).

VI. EVEN IF THIS COURT SHOULD AGREE WITH THE COURT BELOW THAT A CONSTITUTIONAL CONSTRUCTION OF SECTION 19 IS IMPOSSIBLE, THE REMEDY ADOPTED BELOW IS IN CONFLICT WITH BOTH THE PRECEDENTS OF THIS COURT AND CONGRESSIONAL INTENT.

Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. at 344 (which carried the day for the plurality) is a model for deferring to legislative purpose when dealing with an unconstitutional statute. *Welsh* dealt with the religious exemption to the selective service law. Justice Harlan was hardly a judicial activist in the area of religious freedom. He dissented in *Sherbert v. Verner*, 374 U.S. 398 (1963), and later wrote in *Welsh*, "the Free Exercise Clause does not require a State to conform a neutral secular program to the dictates of religious conscience of any group." 398 U.S. at 358 n.9. This thinking reflects this Court's recent opinion in *Employment Division v. Smith*, ___ U.S. ___, 110 S. Ct. 1595, 1603 (1990).

Yet, this attitude that the judiciary should not unduly interfere with the legislature compelled Justice Harlan's conclusion in *Welsh* that it was absolutely improper to strike down a religious exemption statute just because (as here) the statute was underinclusive. He said:

> Where a statue is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

398 U.S. at 361.

In *Welsh*, he determined that the proper remedy for an unconstitutional statute was to extend its coverage to those aggrieved by the exclusion. His conclusion was driven not only by the congressional desire to exempt some conscientious

objectors, but also by the fact (as here) that the statute had a savings clause.

> While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.

Id. at 364.

That is precisely the situation here: the judicial boundaries have been set by Congress. The savings clause, the severability clause cited by Harlan in *Welsh*, is virtually identical to the savings clause applicable to Section 19. *Compare*, *Welsh*, 398 U.S. at 364 with 29 U.S.C. § 166.[32]

Justice Harlan's belief that extension, not nullification, is the proper remedy for constitutional challenges to underinclusive statutes has been adopted and followed by this Court in subsequent cases.[33] *See, e.g., Califano v. Westcott*, 443 U.S. at 89-90; *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974).

The practice of this Court to extend unconstitutional underinclusive statutes, especially when accompanied by a severability provision, is so well known to Congress that when it amended the Social Security Act following the decision of this

---

[32] Unlike the court below, Justice Harlan did not draw fine distinctions based on the fact that the savings clause referred to the invalidity of "provisions." (See the preceding section of this brief). Instead, he saw that Congress had instructed the judiciary to save as much as possible and had indicated that it would be "'satisfied with what remained'" *Welsh*, 398 U.S. at 364, quoting *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 235 (1932).

[33] The court below seemed to believe that it was beyond its power to extend the religious exemption clause to include Mr. Wilson. App. at 11a. This Court has held that no such remedial incapacity exits. *Califano v. Westcott*, 443 U.S. at 91.

Court in *Califano v. Goldfarb*, 430 U.S. 199 (1977), it included a severability provision which specifically prohibited an extension. *Heckler v. Mathews*, 465 U.S. 728, 734 & n.3 (1984). This limitation caused the Court to note that ordinarily extension, rather than nullification, is the proper course to take to remedy an underinclusive statute; except where Congress has clearly, through the wording of the severability clause, expressed its preference for nullification. *Id.* at 739 n.5.

The court below did not take the course ordinarily taken by this Court to remedy underinclusive statutes. It did not take the course commanded by Congress through its inclusion of a severability clause in the statute. Instead of extending Section 19, the court below struck it down.

Congress demonstrated its intent to create a safe harbor for religious objectors. When the court below completely demolished that safe harbor by striking down the statute, it not only thwarted the will of Congress, but it crossed the statutory line drawn by Congress for remedying constitutional defects.[34] This Court should hold the court below to the congressional line.

---

[34] In its discussion of the propriety of striking down Section 19, the court below referred to the Free Exercise claims raised by Mr. Wilson. The court determined that the Free Exercise clause did not mandate the accommodation sought by Mr. Wilson. App. at 11a-12a. In this the court also erred. This Court, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), held that compulsory financial support of labor unions violated the First Amendment associational freedom of nonmembers, but that these rights were overcome by the state interest in requiring reimbursement for bargaining costs. *Id.* at 224-26. Here, Congress has expresaly stated that it intended to create a safe harbor for religious objectors and only compel them to pay fees to a charity. If the court had more closely considered the will of Congress, it would have found that Mr. Wilson's First Amendment asociational and Free Exercise rights were supported, not fettered, by congresaional interest.

CONCLUSION

For the reasons set forth in this petition, it is respectfully requested that review of the decision of the appeals court be granted.

Respectfully submitted,

BRUCE N. CAMERON *
MILTON L. CHAPPELL
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorneys for Petitioner
* *Counsel of Record*

February 28, 1991

APPENDICES

APPENDIX A

Opinion of the
United States Court of Appeals
for the Sixth Circuit

December 4, 1990

MAURICE S. WILSON, Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 90-5089.

United States Court of Appeals,
Sixth Circuit.

December 4, 1990.

Before: KRUPANSKY and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

MILBURN, Circuit Judge.

Petitioner Maurice S. Wilson seeks review of a decision of the National Labor Relations Board ("Board") dismissing an unfair labor practice complaint which charged that the union unlawfully demanded that Wilson be discharged for failing to join the union or pay union dues. Because we hold that section 19 of the National Labor Relations Act, 29 U.S.C. § 169, is unconstitutional and cannot be construed as petitioner requests, we deny the petition for review.

I.

In 1986, Grand Rapids City Coach Lines, Inc. ("the Company") and Amalgamated Transit Union, Local 836 ("the Union") were parties to a collective bargaining agreement which included a union security provision requiring employees covered by the agreement to become members of the Union. Maurice Wilson was hired by the Company in August 1986 as a mechanic's helper. On October 20, 1986, the Union asked Wilson to sign a card authorizing the Company to deduct union dues and initiation fees from his wages and forward the money to the Union. Wilson refused to sign the authorization card due to personal

religious convictions against union membership.[1] On November 11, 1986, the Union again asked Wilson to sign the authorization card, and Wilson again declined to do so. However, Wilson did offer to pay an amount equal to union dues to a charitable organization.

On November 18, 1986, the Union made a written request to the Company to discharge Wilson for his failure to pay union dues and initiation fees as required by the collective bargaining agreement. The Company refused to discharge Wilson, and on December 16, 1986, the Union filed a grievance to compel the Company to comply with the collective bargaining agreement. On February 9, 1987, the Company filed an unfair labor practice charge against the Union for demanding Wilson's discharge. On January 19, 1988, the General Counsel for the Board issued a complaint alleging that the Union engaged in an unfair labor practice in violation of 29 U.S.C. § 158(b)(2) by demanding Wilson's discharge, and a hearing on the complaint was held before an administrative law judge ("ALJ") on April 20, 1988.

On July 18, 1988, the ALJ issued a decision recommending that the complaint against the Union be dismissed. The ALJ concluded that the Union's discharge request was proper because Wilson failed to prove that he fit within section 19 of the National Labor Relations Act (NLRA), which exempts from union membership "[a]ny employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations . . . ." 29 U.S.C. § 169. The ALJ determined that

---

[1]Wilson is a Christian, and he is a member of Faith Assembly church in Warsaw, Indiana. Faith Assembly has no written creed or statement of doctrine other than the Bible. Wilson's opposition to union membership is based on his personal beliefs derived from the Bible. Among the scriptures relied on by Wilson are Matthew 5, 6, and 7 (the Sermon on the Mount), 2 Corinthians 6:14-18 ("Be ye not unequally yoked together with unbelievers. . . ."), and Ephesians 6:5-9 ("Servants, be obedient to them that are your masters. . . .").

Wilson did not qualify for the section 19 exemption because he was not a member of a "bona fide religion, body, or sect" which holds conscientious objections to union membership. Rather, Wilson objected to union membership on the basis of personal religious convictions.

The General Counsel filed exceptions to the ALJ's decision; however, on March 31, 1989, a three-member panel of the Board affirmed the ALJ's decision and adopted his recommendation that the complaint be dismissed. In a footnote to its decision and order, the panel stated, "Although employee Wilson's personal religious beliefs do include a conscientious objection to joining or financially supporting labor unions, it has not been shown that he is a member of an organized religious group that historically has held the same belief regarding unions." One member of the panel observed that "any possible constitutional problems relative to the religion clauses of the first amendment suggested by the General Counsel need not be addressed." The Company took no further action upon dismissal of the complaint, but Wilson filed the present petition for review of the Board's decision and order.

The principal issues presented are (1) whether section 19 of the NLRA, 29 U.S.C. § 169, violates the religion clauses of the First Amendment, and, if so, (2) whether the statute can be construed to avoid any constitutional defect.

II.

We have jurisdiction to review the Board's order because the events which gave rise to the alleged unfair labor practice occurred in Grand Rapids, Michigan. *See* 29 U.S.C. § 160(f). The issues presented are questions of law which are reviewable de novo. *NLRB v. Hydro Conduit Corp.*, 813 F.2d 1002, 1005 (9th Cir. 1987).

Wilson concedes that his "religious beliefs about unions are his personal convictions, and are not based on the teachings of an 'organized' denomination or church of which he is a member."

Thus, he does not qualify for the religious objectors' exemption under a literal reading of section 19. Because section 19 applies only to employees who are members of a "bona fide religion, body, or sect which has historically held conscientious objections" to joining or financially supporting labor organizations, Wilson contends that the statute violates the religion clauses of the First Amendment. Rather than invalidating the statute, Wilson argues that we should construe section 19 to avoid the constitutional defect by eliminating the membership requirement. Wilson urges this court to construe section 19 as applying to all employees having religious objections to joining or supporting unions, regardless of whether the employees are members of a religion, body, or sect which has historically held such objections. Wilson asserts that the legislative history of section 19 supports his proposed construction of the statute.

Section 19 of the NLRA, as amended in 1980, provides in relevant part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund. . . .

29 U.S.C. § 169. As originally enacted in 1974, section 19 applied only to health-care employees. One court has observed that section 19 was amended in 1980 to reconcile the NLRA with section 701(j) of Title VII. *See International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 170 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

Congress amended Title VII in 1972 to require "employers to take reasonable steps to accommodate their employees' religious beliefs." *Boeing*, 833 F.2d at 168. Section 701(j) of Title VII incorporates the reasonable accommodation duty in the definition of religion:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). In cases brought under Title VII, courts have held that the duty to accommodate an employee's religious beliefs extends to unions as well as employers. *See Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). Where a collective bargaining agreement includes a union security provision, courts have held that the duty to accommodate is satisfied by allowing an employee to donate an amount equal to union dues to a mutually acceptable charity. *See id.* at 1242; *see also McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 36 (6th Cir. 1982). The substituted charity accommodation lets the union enjoy the benefits of a union security provision while permitting employees "to practice in accordance with their religious convictions." *Tooley*, 648 F.2d at 1242.

While section 19 of the NLRA codifies the substituted charity accommodation, "[t]he protections afforded employees' religious beliefs are not as broad under section 19 as they are under section 701(j)." *Boeing*, 833 F.2d at 169. "[U]nder section 19 only employees who are members of 'bona fide' religions which have 'historically held conscientious objections' to joining unions may contribute to charities in lieu of paying their dues to the union." *Id.* In contrast, Title VII protects "all aspects of religious observance and practice, as well as belief" regardless of membership in a religion, body or sect. 42 U.S.C. § 2000e(j). Thus, "[a]n employee who sincerely held religious beliefs opposing unions could be relieved from paying dues under Title

VII, even if he or she was not a member of an organized religious group that opposes unions." *Boeing*, 833 F.2d at 169.

Section 701(j) of Title VII has been found to be constitutional. *See McDaniel*, 696 F.2d at 37; *Tooley*, 648 F.2d at 1245-46. The initial issue presented in this case is whether section 19 of the NLRA is constitutional. Our analysis begins with the Supreme Court's decision in *Larson v. Valente*, 456 U.S. 228 (1982). "*Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971)." *Hernandez v. Commissioner Internal Revenue*, 109 S. Ct. 2136, 2146-47 (1989).

Although both parties argue that the statute should be evaluated under the *Lemon* test, we conclude that section 19 is subject to strict scrutiny under *Larson*. "*Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*." *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2870 (1987) (emphasis in original) (citation omitted). Like the statute in *Larson*, which exempted from registration and reporting requirements only those religious organizations that received more than fifty percent of their total contributions from members, section 19 facially discriminates among religions because it exempts from union membership only those employees who are members of "bona fide" religious organizations having the beliefs described in the statute. Thus, section 19 creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute.

When a law facially differentiates among religions, it is subject to strict scrutiny and it "must be invalidated unless it is justified by a compelling governmental interest." *Larson*, 456 U.S. at 247. Moreover, the law must be "closely fitted" to further the compelling governmental interest. *Id.* at 251. The Board

contends that Congress had a compelling reason for drafting section 19 narrowly and that was "to direct 'difficult and troublesome' . . . inquiries concerning the 'religious' nature of an objector's beliefs into a forum significantly better equipped to deal with such issues: the federal courts."

The Board's argument misconceives the nature of the inquiry under strict scrutiny. The Board offers an explanation for the distinction, but it does not identify a compelling governmental interest furthered by the statute. In the absence of any identifiable governmental interest served by the statute, we must declare it unconstitutional. Moreover, even were we to find that the statute served a compelling governmental interest of protecting religious freedom in the workplace, the statute would still fail strict scrutiny. While protection of religious freedom in the workplace may be a compelling governmental interest, section 19 could be more closely fitted to further this interest by paralleling the protection afforded by Title VII, which is without regard to membership in a particular religious organization.

Although application of the *Lemon* test is unnecessary to resolve the present case, we note that section 19 would also fail to pass constitutional muster under that test. *See Larson*, 456 U.S. at 252 (evaluating statute under *Lemon* after finding it failed strict scrutiny). To survive scrutiny under *Lemon*, "the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 251-52, 403 U.S. at 612-13 (citations omitted).

Wilson concedes that section 19 of the NLRA satisfies the first element of the *Lemon* test. The secular purpose element "does not mean that the law's purpose must be unrelated to religion . . . ." *Amos*, 107 S. Ct. at 2868. Like section 701(j) of Title VII, section 19 has a legitimate secular purpose of eliminating discrimination in employment practices. *See Boeing*, 833 F.2d at 168; *McDaniel*, 696 F.2d at 37.

The second prong of the *Lemon* test asks whether the primary effect of the statute advances or inhibits religion. In *Tooley*, the court held that the substituted charity accommodation available under section 701(j) of Title VII "neither increases nor decreases the advantages of membership in the [plaintiffs' religion] in a manner so substantial and direct that it 'advances' or 'inhibits' the plaintiffs' religion." 648 F.2d at 1246. Similarly, in *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 454 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981), the court held that application of section 701(j) did not "have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another." The court also noted that section 701(j) "requires no particular sectarian affiliation or theological position . . . ." *Id.* The same cannot be said for section 19.

Unlike section 701(j) of Title VII, section 19 of the NLRA does require a particular sectarian affiliation *and* a particular theological position. Section 19 requires an employee to be a member of *and* adhere to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or supporting unions. Section 19 also has the effect of increasing the advantages of membership in the type of religious organization described in the statute. If an employee is a member of a religion, body, or sect which has historically held conscientious objections to union membership, the employee qualifies for the exemption afforded by section 19, while employees having the same religious convictions against joining or supporting unions, but who are not members in a qualifying religion, must resort to filing an action under section 701(j) of Title VII. Thus, section 19 has the effect of advancing the beliefs of one sect over those of another.

Section 19 also fails the third prong of the *Lemon* test. Section 19 requires employers, and ultimately courts, to determine if the religion, body, or sect of which the employee is a member is bona fide and if it has historically held conscientious objections to joining or supporting unions. This inquiry certainly borders on excessive entanglement with religion. In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian*

Church, 393 U.S. 440, 450 (1969), the Court observed that the First Amendment forbids a court from determining "matters at the very core of a religion—the interpretation of particular church doctrine and the importance of those doctrines to the religion." Unlike section 701(j), the inquiry under section 19 requires more than simply determining if the employee's beliefs are sincere. It requires the court to validate the legitimacy of the religion, body, or sect and to verify the existence and longevity of its doctrine regarding labor unions.

The Board contends that the inquiry required by section 19 is not unlike the "concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption." *Cummins v. Parker Seal Co.*, 516 F.2d 544, 554 (6th Cir. 1975), *aff'd by equally divided Court*, 429 U.S. 65 (1976), *vacated on other grounds unrelated to constitutionality*, 433 U.S. 903 (1977). The Board's analogy to tax cases is unpersuasive. In *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688, 698 (1990), the Court observed that a generally applicable sales tax "is neutral and nondiscriminatory on questions of religious belief." The same cannot be said for section 19 because it distinguishes on the basis of religious belief. In *Hernandez v. Commissioner of Internal Revenue*, 109 S. Ct. 2136, 2147 (1989), the Court held that routine regulatory application of neutral tax laws did not cause excessive entanglement because it involved "*no inquiries into religious doctrine*, no delegation of state powers to a religious body, and no 'detailed monitoring and close administrative contact' between secular and religious bodies . . . ." (Emphasis added) (citations omitted). However, application of section 19 does involve inquiry into religious doctrine, and the result is excessive entanglement of government with religion.

Although Wilson argues that section 19 is unconstitutional, he does not seek to have the statute completely invalidated. Rather, Wilson wants section 19 construed so as to avoid the constitutional defect by eliminating the membership requirement. *See Communications Workers v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988). Relying on the principle that courts should construe

statutes to avoid constitutional defects. Wilson argues that the legislative history of section 19 supports construing the statute to apply to all employees having religious objections to union membership without regard to membership in a particular religion, body, or sect.

"It is of course true that federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and that when faced with such doubts the Court will first determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Beck*, 108 S. Ct. at 2657. "But statutory construction may not be pressed 'to the point of disingenuous evasion,' and . . . the Court may not embrace a construction that 'is plainly contrary to the intent of Congress.'" *Id.* (citations omitted). We need not review the legislative history of section 19 because it is not "fairly possible" to interpret the statute so as to render it constitutionally valid.

Wilson relies on *Grant v. Spellman*, 99 Wash. 2d 815, 664 P.2d 1227 (1983) (en banc), in which the Washington Supreme Court construed a state statute having language very similar to section 19. The state statute required that "agreements involving union security provisions must safeguard the right of nonassociation of public employees based on bona fide religious tenets or teachings of a church or religious body of which such public employee is a member." *Id.* at 1230; Wash. Rev. Code § 41.56.122(1). The court concluded that the statute was susceptible of two meanings, and using a disjunctive reading of the statutory language, the court held that the plaintiff, who held personal religious beliefs against supporting unions but was not a church member, qualified for the statutory exemption from paying union dues.

Although section 19 is similar to the statute construed in *Grant*, there is an important distinction which precludes the type of disjunctive reading given the state statute. The statute in *Grant* could be read disjunctively to "allow a person to claim the union dues exemption based on either (1) bona fide religious tenets, or (2) teachings of a church or religious body of which the

person is a member." 664 P.2d at 1230. However, in section 19, the membership language and the conjunction "and" precede the language read disjunctively in *Grant*. Thus, it is not "fairly possible" to construe the statutory language to eliminate the membership requirement. Accordingly, it is impossible "to interpret the statute in a manner that renders it constitutionally valid." *Beck*, 108 S. Ct. at 2657.

Wilson alternatively urges this court to simply discard the membership language of section 19. Wilson argues that section 19 should be read as follows: "Any employee who holds conscientious objections to joining or financially supporting labor organizations shall not [be so required]." Wilson asserts that this result would be consistent with the savings provision of section 16 of the NLRA, which provides:

> If any provision of this subchapter, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this subchapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

29 U.S.C. § 166.

Wilson's argument amounts to a request for this court to perform a legislative function. However, courts cannot judicially redraft statutory language. *United States v. Locke*, 471 U.S. 84, 95 (1985). The savings provision of the NLRA also fails to rescue Wilson. Section 16 preserves other provisions of the subchapter when one provision is declared invalid. It does not preserve the remainder of a provision when a portion thereof is invalidated. Section 16 also preserves the application of a provision to persons or circumstances other than those as to which it was held invalid as applied. This cannot save section 19 because it is unconstitutional on its face, not as it is applied.

Finally, Wilson argues that section 19 violates the free exercise clause of the First Amendment. Wilson contends that

the free exercise clause requires that section 19 be expanded to protect the religious freedom of all employees, not just members of the religions described in the statute. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez*, 109 S. Ct. at 2148. Thus, to establish a violation of the free exercise clause an individual must first show that the government has placed a substantial burden on the practice of his religion.

Section 19 does not burden Wilson's practice of his religion. Rather, section 19 gives special treatment to members of religions having the beliefs described in the statute because it requires employers to provide a substituted charity accommodation. On the other hand, nonmember employees having the same religious beliefs must file an action under section 701(j) of Title VII to obtain an accommodation. Because section 19 grants a benefit on the basis of membership in a particular religion, it violates the establishment clause, but this does not constitute a violation of the free exercise clause. While the free exercise clause may protect Wilson's religious beliefs, it does not mandate the form of accommodation offered by section 19.

III.

In summary, Wilson persuasively argues that section 19 violates the establishment clause of the First Amendment. However, contrary to Wilson's contention, the statute cannot be construed to remedy the constitutional defect. Moreover, the free exercise clause of the First Amendment does not mandate the form of accommodation offered by section 19. Therefore, we hold that section 19 of the NLRA, 29 U.S.C. § 169, is unconstitutional. Accordingly, the petition for review is DENIED on the merits.

BEST AVAILABLE COPY

APPENDIX B

Decision and Order of the National Labor Relations Board (which incorporates the July 18, 1988 decision of the Administrative Law Judge)

March 31, 1989

---

293 NLRB No. 62

SCD
D--9487
Grand Rapids, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL UNION 836, AMALGAMATED TRANSIT UNION

and

Case 7--CB--7107

GRAND RAPIDS CITY COACH LINES, INC.

DECISION AND ORDER

On July 18, 1988, Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the

judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

---

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although much of the evidence related to Wilson's becoming a member of the Respondent, it is clear that the Respondent offered him the option of either becoming a member or obtaining financial core status through the payment of a sum equal to the dues and initiation fees paid by members.

Chairman Stephens agrees with his colleagues in dismissing the complaint. In his view, any possible constitutional problems relative to the religion clauses of the first amendment suggested by the General Counsel need not be addressed. As found by the judge, the express language of Sec. 19 of the Act limits exemptions from union-security requirements to those employees whose religious objections to joining and financially supporting labor organizations are based on the tenets of "a bona fide religion, body, or sect." Although employee Wilson's personal religious beliefs do include a conscientious objection to joining or financially supporting labor unions, it has not been shown that he is a member of an organized religious group that historically has held the same belief regarding unions. While the Board is obligated to construe legislation in a manner that will avoid constitutional questions, this obligation does not leave us free to adopt constructions that are not "'fairly possible'" *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157 (1983), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Dated, Washington, D.C. March 31, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD--157--88
Grands Rapids, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL UNION 836,
AMALGAMATED TRANSIT UNION

and Case No. 7-CB-7107

GRAND RAPIDS CITY COACH LINES, INC.

Howard M. Dodd, Esq.,
for the General Counsel
Craig Avery, Esq.,
of Comstock Park, Michigan,
for the Respondent.
Robert J. Chovance, Esq.,
of Grand Rapids, Michigan,
for the Charging Party.

Decision

Statement of the Case

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held in Grand Rapids, Michigan, on April 30, 1988, on complaint of the General Counsel against Local Union 836, Amalgamated Transit Union, here called the Union or the Respondent. The complaint issued on January 19, 1988, upon a charge filed on February 9, 1987, by Grand Rapids City Coach Lines, Inc., here called the Company, or the Charging Party. The sole issue presented is whether the Union unlawfully demanded that the Company discharged an employee, and filed a grievance to achieve that objective, in violation of Section 8(b)(2) and the Section 2(6) and the (7) of the Act. A brief was filed by the General Counsel after the close of the hearing.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Company

The Respondent, with a place of business in Grand Rapids, Michigan, is engaged in providing bus operators and maintenance employees to the Grand Rapids are transit authority for the operation and maintenance of public transportation. During the year preceding issuance of the complaint it derived gross revenues in excess of $500,000 dollars and provided services valued in excess of $50,000 dollars to the Grand Rapids Area Transit Authority, which in turn purchased and received goods and services valued in excess of $50,000 dollars from out of state sources. I find that the Company is an employer within the meaning of the Act.

[2]II. The Labor Organization Involved

I find that Local Union 836, Amalgamated Transit Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

During the year 1986 the Company and the Union were parties to a collective bargaining agreement which, among other terms, required employees covered by that contract to become members of the Union. Maurice Wilson had worked for the company two years but had never become a union member. On October 20, 1986, the Union asked Wilson to sign an authorization to the company to deduct Union dues and initiation fees on his behalf and forward the money to the Union. Wilson refused to sign such authorization. On November 11, 1986, the Union again asked Wilson to sign such dues and initiation fees check off, and he again refused. By letter dated November 18, 1986, the Union requested the company to discharge Wilson for such

failure to pay dues and initiation fees. When the Company refused to discharge the man, the Union, on December 16, 1986, filed a grievance to compel the company to live up to the contract in effect. No action has been taken on that grievance. Instead, on February 9, 1987, the company filed the charge in this proceeding. The complaint issued a year later.

Wilson's stated reason for refusing to pay Union dues or initiation fees, as he testified at the hearing, is that "it was against my personal, Christian convictions to join the Union or pay its dues." Wilson added he's a member of a church called "The Body of Jesus Christ."

The complaint rests upon a reading of Section 19 of the 1980 amendment to the National Labor Relations Act. In pertinent part it reads as follows:

> Any employee who is a member of and adheres to established and traditional tenants or teachings of a bonafide religion, body, or sect which has historically held conscienious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment;

If, on the evidence received, Wilson could be said to fall within the scope of the foregoing statutory language, he was free to refuse to join or to pay any money to the Union. If he did not fall within the intended coverage of that language, the Union had a right to have him discharged from this job for refusing to become a Union member. As I read this statute, and consider the totality of Wilson's testimony, I find that he did not fall within the ambit of that statutory protection, and shall therefore recommend dismissal of the complaint.

The statute requires that the employee who refuses to pay Union dues be a "member of" a "bonafide religion, body, or sect," which holds "conscientious objections" to join any Union. There is no evidence here that Wilson is a "member" of any such

"body or sect." As he admitted in his very opening statement at the hearing, it was a "personal" conviction of his upon which he rested his refusal. Instead of resting upon "established and traditonal [3]tenants or teaching", of any "body or sect", he relied upon quotations from the Bible, which he kept reading as he went along with his testimony. He quoted from Galatians, Chapter 5 Verse 1; Sermon on the Mount; Verses and Chapters 5, 6, and 7; Matthew 5, 6 and 7; Corinthians 2nd, Chapter 6, Verse 14. In his letters to the Union, he explained the basis of his religious objections, he quoted Romans 13, 1 to 7; Peter 2, 19 to 21; Titus 3, 1 to 2; Jude 8-10; John 18: 36; Timothy 2, 1 to 3; etc, etc.

In his cross examination of the witness, Counsel for the Union then threw other biblical quotations at the witness, arguing that those citations pointed to another significance in the Bible from the way Wilson read the book.

I have no intention, in this decision, to comment in the least as to who was right and who was wrong in their understanding of the religious teachings of the past. It would not only be a hopeless task, but I am not in the least qualified to express any such views. What all this testimony boils down to, however, is that the witness' defense against having to join the Union, rests entirely upon his idea as to what Jesus Christ, Saint Peter, or any others who are quoted in the Bible, meant when they said this or that. In other words, that any individual could come before the Board, argue his understanding of the Bible, and for that reason alone avoid paying his dues at the Union's demand. If the General Counsel is correct in this case, it means any person could avoid perfectly legal Union membership clauses in his Union's contract that requires membership as a condition of employment by simply arguing how he reads the Bible. I do not think Section 19 of the statute was so intended.

When Wilson first claimed a religious privilege as the basis for his refusal to pay Union dues, the Union officers, aware of the statutory language, asked him which church, or religious organization he belonged to. Admitting, in his written reply, that

"the assembly which I attend is not a denomination of religion organization established by a constitution, or man," he mentioned the phrase "faith assembly", saying it had been located in Warsaw, Indiana. Asked, finally, to be more specific, Wilson told Blank Taylor, the Union's financial secretary, he did not have the address of that group. Recalled as a witness at the close of the hearing, Wilson then admitted he gave Taylor the name of the "minister" of that group, although he knew that man, whoever he was, had been dead for three years. When Taylor, looking into the matter, inquired at Warsaw, he could not locate any such organization. He checked with the police department there but they could not help him either.

With Wilson continuing to generalize how his "church" was based upon various quotations from the Bible — "I, personally, have objections to joining the Union", "they [these beliefs] came to me my own personal consideration", — he was asked why did he not reveal reliably the identity of his "church", or "organization", if in reality there existed such a religious "body, or sect." His only reply, at the hearing, was that he did not want "to involve" that organization. "Because I did not want to involve the leadership within the church or the congregation with this Union squabble, as of now. I, also, stand on this verse myself, because I, personally, have objections to joining a Union and paying the dues set forth from the word of God . . ."

[4]This man may very well have been telling the truth as to how he reads the Bible, or as to his personal religious convictions. I have no reason to doubt that part of his testimony. But as to whether he is, or was, a member of any sect or religious organization he was not telling the truth, either at the hearing or in his earlier talking with the Union agent.

In sum, Section 19 of the Statute makes it an exception to the general rule of law "that whenever there is in effect a collective" a collective-bargaining agreement making Union membership a condition of employment, any employee who refuses to conform to that provision must be discharged at the request of the Union. If the employee in question can prove he

fits into the exception, he escapes the effect of that clause. It is in fact an affirmative defense the employee may offer to keep his job. I view it as a burden placed upon Wilson in this case to prove affirmatively that the exception clause fitted him. He did not prove it. The discharge request by the Union was therefore perfectly proper.

In his post hearing brief the General Counsel admits that Wilson was never a member of any sect or organization or established religious church.

ORDER

I hereby recommend that the complaint be, and it hereby is dismissed.

Dated, Washington, DC July 18, 1988.

/s/
Thomas A. Ricci
Administrative Law Judge